

5 September 1975

MEMORANDUM FOR THE RECORD

SUBJECT: NSSM 229

1. I called Jeanne Davis, Staff Secretary of the National Security Council, to advise that I am the CIA designee to the Scowcroft group created by NSSM 229. She advised that the National Security Council Staff is putting together some papers with suggestions for departmental thought and hoped to have an agenda and some action underway in the next few days. I pointed out in this connection that the NSSM, dated 19 August, had proceeded within CIA only to the point of designating me as the CIA representative and I had been away until this week. It seemed to me highly unrealistic that the executive branch could thoroughly study this matter by 30 September. She entirely agreed. She said considerable slippage was anticipated. NSC regretted that they had utilized an unrealistic deadline, since this would damage credibility, but they had done so in this case. One reason she noted why action could not be accomplished that quickly is that General Scowcroft has been away.

2. I asked what had brought on the NSSM. She indicated there were a number of factors. There had been a growing feeling within the Staff that the time had come to look into the various inconsistencies posed by the Executive order and the statutes involved. There was some question as to the relationship of ICRC to NSC which ought to be resolved. The executive branch now had some experience under the Freedom of Information Act. It might be that additional exemptions ought to be included such as an exemption to protect the confidentiality of Presidential correspondence. All of these had added up to a general feeling that the time had come to thoroughly study the whole area. She hoped we agreed. I indicated I thought there were certainly a number of objections and difficulties in the existing situation and I hoped now was at least as good a time as any other for the executive branch to address itself to these matters.

3. Mrs. Davis indicated she thought the Muskie letter of 21 August, forwarding some 24 questions concerning implementation of Executive Order 11652, presents a timely opportunity to make known the burden and costs problems.



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4 October 1974

The Development and Issuance of E. O. 11652

1. The purpose of this memorandum is to record some of the steps, to the extent that we know them, by which E. O. 11652 and the implementing National Security Council Directive came into existence. In particular, some of the minutiae is not well-known and is likely to be lost or forgotten with the passage of time. This background should be useful to an understanding of the depth of the commitment of the Nixon Administration to the Executive Order and the NSC Directive, particularly the latter.

2. E. O. 11652, approved in March 1972 and effective June 1, 1972, succeeded E. O. 10501 as the law for classifying and protecting national security information. E. O. 10501, which had replaced an Executive order developed from World War II experience, was issued in 1953 and was amended only a few times in the succeeding years. Its provisions for protecting, classifying, and using national security information were not essentially different from those now embodied in E. O. 11652. As amended, it also had requirements for declassifying information. I believe it is generally accepted that under E. O. 10501 the government classified too many documents and did much too little toward accomplishing declassification. It was these defects in the operation of E. O. 10501 which brought on the movement for and ultimate issuance of E. O. 11652.

3. In January 1971 Dr. Kissinger, as National Security Advisor, issued a directive to the appropriate agencies, CIA included, calling for an interdepartmental study and appropriate revision of E. O. 10501. It was clear from his directive that there was no thought that the protective features of E. O. 10501 were inadequate--the objective was to get rid of the overclassification and permanent classification practices.

4. William Rehnquist, then an Assistant Attorney General, chaired an interdepartmental committee. CIA was represented by David Young of the White House, who was not however

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on the National Security Council staff, was a member and, at the end, was chairman. The committee proceeded with its work through the ensuing months. In June the Pentagon Papers issue erupted. It was directly as a result of that matter that the President attended a meeting of the committee in June or July of that year (1971). He directed that there be strict limits on the numbers of government employees authorized to classify information and the new Executive Order duly incorporated that feature.¹ (This restriction continues to receive attention. The Interagency Classification Review Committee consistently presses the point and congressional committees have shown interest in it.) Towards the end of 1971, the committee's work lagged, I think because of Rehnquist's imminent and then actual nomination to the Supreme Court. When Rehnquist was nominated, David Young took over as Chairman in December 1971. The significance of all this was that the Kissinger instruction was now a year old, the crisis of the Pentagon Papers continued, but no new order had been prepared or issued. Moreover, as I remember, on the occasion of the Pentagon Papers issue, the Administration made known that revision of the E.O. 10501 had been under study for some months and the press had indicated some doubts on this. There was, accordingly, some pressure on the Young group to finalize an Executive order promptly, which was done, and E.O. 11652 was approved on March 8, 1972.

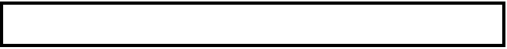
5. I am sure this delay in preparing an Executive order is the reason the E.O. 11652 omits the essentials for the protection and use of information,² but provides in Section 6 that the "President acting through the National Security Council shall issue" implementing directives in the areas specified in Section 6.

1/ That the President's requirements came about because Ellsberg leaked the Pentagon Papers is somewhat ironic. Ellsberg was able to leak the papers because he had access to them, not because he had authority to classify.

2/ The Executive Order does not provide for access, use, physical protection, transmittal and storage protection, need-to-know, third agency rule, or security clearances. These provisions are in the NSC Directive and Appendix A to the Directive.

6. The NSC Directive issued on May 17, 1972, over the signature of Dr. Kissinger, is much broader in scope than is the Executive Order. (Incidentally, at a White House conference of Erhlichman, Helms, and Houston in March, the forthcoming Executive Order was "accepted" by Mr. Helms. The NSC Directive, on the other hand, was never accepted by this Agency and in fact various of our comments and suggestions during the drafting stage were not accepted.) It is interesting also that, although the Order provides that the President, "acting through the National Security Council", will issue the implementing directives, it was Kissinger, not the President, who signed the Directive and Kissinger did so in his capacity as Assistant to the President for National Security Affairs, which is not a statutory NSC office. Indeed we have not been able to locate any document designating Dr. Kissinger as an official of the National Security Council, but it may be that one exists. It may be significant also that the Directive is dated May 17, 1972, just five days before Kissinger accompanied the President to Moscow. It is hard to believe this subject and the draft directive could command much of Kissinger's time and attention at that time.

7. These features of the approval of the Directive are mentioned not to argue that CIA, or any agency, is in a position to challenge the legality of the NSC Directive, although a private person might be able to do so. The point is that aside from Kissinger's signature, which may or may not have been affixed by him, we have no indication of White House approval or commitment to the Directive at that time by anyone other than David Young.


Associate General Counsel

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94TH CONGRESS
1ST SESSION

H. R. 8591

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1975

MR. STEELMAN introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend section 552 of title 5 of the United States Code to clarify certain exemptions from its disclosure requirements, to provide guidelines and limitations for classifying official information.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Freedom of Information
4 Act Amendments of 1975".

5 DESIGNATION OF INFORMATION AS DEFENSE DATA

6 SEC. 2. Section 552 of title 5, United States Code, is
7 amended by adding at the end thereof the following new
8 subsections:

I

1 “(f) (1) The Congress finds and declares that the free
2 flow of information among individuals, between the Govern-
3 ment and the citizens of the United States, and among the
4 separate branches of Government is essential to the proper
5 functioning of the constitutional processes of the United
6 States. The Congress further finds that certain unwarranted
7 policies and procedures for the classification of information
8 have in the past unduly inhibited this free flow of informa-
9 tion, and that in order to correct this situation it is necessary
10 to prescribe certain guidelines and limitations for the classi-
11 fication of information which the President or the head of
12 an agency determines to require limited dissemination in the
13 interest of national defense.

14 “(2) The President and the heads of those agencies
15 listed under subparagraph (A) of paragraph (5) are author-
16 ized to classify as ‘Defense Data’ any official information
17 originated or acquired by them, the unauthorized disclosure
18 of which could reasonably be expected by the President and
19 heads of authorized agencies to cause damage to the national
20 defense. In no case shall information be classified in order
21 to conceal incompetence, inefficiency, wrongdoing, or admin-
22 istrative error, to avoid embarrassment to any individual or
23 agency, to restrain competition or independent initiative, or
24 to prevent or delay for any reason the release of information

1 the dissemination of which will not damage the national
2 defense.

3 “(3) The classification standard for Defense Data (as
4 that which could reasonably be expected by the President
5 and heads of authorized agencies to cause damage to the
6 national defense) may only be applied to the following:

7 “(A) disruption of foreign relations affecting the
8 defense of the United States;

9 “(B) compromise of a current operational plan or
10 contingency plan for the defense of the United States
11 against attack, including the related intelligence
12 estimate;

13 “(C) compromise of a current intelligence operation
14 important to the defense of the United States;

15 “(D) compromise of an official cryptologic system
16 important to the defense of the United States;

17 “(E) disclosure of official information regarding a
18 technological development of the Government that is
19 primarily useful for military purposes which disclosure
20 itself would eliminate a known technological advantage
21 of the United States important to the national defense;

22 “(F) disclosure of official information which dis-
23 closure itself would make a current weapon system or

1 a military operation vulnerable to successful hostile at-
2 tack or other successful countermeasures; and

3 "(G) information furnished to the United States
4 by a foreign government or international organization,
5 the unauthorized disclosure of which could reasonably
6 be expected to cause damage to the national defense.

7 "(4) Except as otherwise provided by law, no desig-
8 nation other than 'Defense Data' may be used to classify in-
9 formation in the interest of national defense.

10 "(5) (A) Official information may be classified as
11 Defense Data by the heads of the following agencies or
12 designated personnel: the Department of State; the Depart-
13 ment of Defense and the military departments; the Depart-
14 ment of Transportation; the Energy Research and Develop-
15 ment Administration; the Central Intelligence Agency; the
16 National Aeronautics and Space Administration; and such
17 offices within the Executive Office of the President as the
18 President may designate by Executive order.

19 "(B) Within the agencies described in subparagraph
20 (A), the classification of official information as Defense
21 Data may only be done by the head of each such agency,
22 and such other senior principal deputies, assistants, and sub-
23 ordinate officials within each such agency who are designated
24 in writing by the head of each such agency.

25 "(C) The President may impose specific limitations

1 on the delegation of classification authority within agencies
2 so as to limit it to individuals whose operational responsibil-
3 ities require that they have such authority.

4 “(D) The head of each authorized agency shall semi-
5 annually review the authority of each individual whom he
6 has designated in writing as having authority to classify
7 official information and shall revoke such designation in the
8 case of any individual whose operation responsibilities no
9 longer require that he have such authority.

10 “(E) No individual authorized by the head of his
11 agency to classify official information may redelegate such
12 authority to any other individual.

13 “(F) A person who copies or otherwise reproduces or
14 uses information already classified as ‘Defense Data’ or di-
15 rects the copying, reproduction, or other use of such informa-
16 tion shall not require classification authority for the purpose
17 of placing or directing the placement of the ‘Defense Data’
18 designation on documents or other material containing such
19 information and shall not be delegated classification authority
20 for that purpose.

21 “(G) Official information shall be classified according
22 to what it reveals and not according to its relationship with
23 or reference to other information or material. No document
24 or other material may be given the ‘Defense Data’ marking
25 unless it contains or reveals an element of official informa-

1 tion specifically designated as 'Defense Data' pursuant to
2 this subsection.

3 “(7) (A) Any document or other material object, in-
4 cluding communications transmitted by electrical means, con-
5 taining or revealing information designated as 'Defense
6 Data' shall be appropriately and conspicuously marked or
7 otherwise identified to show the designation 'Defense Data'.

8 “(B) The President may prescribe additional protective
9 markings and notations for documents and other material
10 objects containing or revealing Defense Data.

11 “(8) Official information originated or acquired by an
12 agency and classified as 'Confidential', 'Secret', or 'Top
13 Secret' pursuant to any Executive order shall be subject to
14 the provisions of this subsection. A material item contain-
15 ing such information shall be marked to show that it has
16 been designated 'Defense Data', or to show that it has been
17 declassified and cite this subsection or subsection (g) as
18 authority for such marking.

19 “(g) (1) (A) Any official information which—

20 “(i) is classified pursuant to the provisions of sub-
21 section (f) after the effective date of such subsection;
22 and

23 “(ii) at any time thereafter ceases to meet the re-
24 quirements of subsection (f) (2), or can no longer be

1 protected against unauthorized disclosure, shall be de-
2 classified promptly.

3 “(B) Except as provided in paragraph (2), any offi-
4 cial information which is classified pursuant to subsection (f)
5 on or after the effective date of such subsection and which
6 is not declassified as provided in subparagraph (A), shall
7 be declassified automatically upon the expiration of three
8 years after the end of the month of its classification, regard-
9 less of whether the document or other material containing the
10 information has been marked to show the declassification.

11 “(C) Except as provided by paragraph (2), any offi-
12 cial information which was originally classified as ‘Confiden-
13 tial’, ‘Secret’, or ‘Top Secret’ pursuant to any Executive
14 order during the three-year period immediately preceding
15 the effective date of subsection (f), and which is classi-
16 fied as ‘Confidential’, ‘Secret’, or ‘Top Secret’ on such effec-
17 tive date, shall be declassified automatically upon the ex-
18 piration of three years after the end of the month of the
19 original classification of such information regardless of
20 whether the document or other material containing the
21 information has been marked to show the declassification.
22 If the original date of classification of such information or
23 material is not known, it shall be declassified not later than

1 the expiration of three years after the effective date of sub-
2 section (f).

3 “(D) Except as provided by paragraph (2), any offi-
4 cial information which was originally classified pursuant to
5 any Executive order, directive, memorandum, or other au-
6 thority prior to the three-year period immediately preceding
7 the effective date of subsection (f), and which continues to
8 be classified on such effective date, shall be declassified auto-
9 matically upon the expiration of six months after such effec-
10 tive date, regardless of whether the document or other
11 material containing the information has been marked to
12 show the declassification.

13 “(2) (A) Subject to additional limitations as the Presi-
14 dent shall prescribe regarding subject matter, any official
15 information which is classified and which is subject to auto-
16 matic declassification as provided in subparagraph (B),
17 (C), or (D) of paragraph (1) may be assigned a deferred
18 automatic declassification date of not more than two years
19 by the classifying official upon a determination that the infor-
20 mation is of such sensitivity and importance to continue to
21 satisfy the requirements for classification as ‘Defense Data’.

22 “(B) The President or the head of an agency may as-
23 sign a deferred automatic declassification date of more than
24 two years after the date of declassification provided for under
25 subparagraph (B), (C), or (D) of paragraph (1) upon

1 determination that the classified information continues to
2 satisfy the criterion for classification as 'Defense Data'. For
3 each such item of information for which the President or
4 the head of an agency makes such a determination, he shall
5 submit, in writing, to the Committee on Government Opera-
6 tions of the Senate, the Committee on Government Opera-
7 tions of the House of Representatives, and the Comptroller
8 General of the United States a detailed justification for the
9 continued classification of such information. Both such com-
10 mittees shall compile and print at least annually as a public
11 document all such reports received by them, except that upon
12 recommendation of the President or the head of the agency
13 concerned, such committee may delete from printing any
14 material which itself satisfies the requirements for classifica-
15 tion as 'Defense Data'. Each such deletion shall be indi-
16 cated in the printed document, and the complete document
17 without deletions shall be kept in committee files and made
18 available, upon request, to any Member or committee of
19 Congress. This authority to defer declassification shall not be
20 redelegated by the head of any agency.

21 “(C) Any information assigned such a deferred auto-
22 matic declassification date may at any time be declassified
23 in accordance with paragraph (1) (A).

24 “(h) (1) Subject to such implementing orders as shall
25 be promulgated by the President, the head of each agency

1 which exercises authority to classify or declassify official
2 information shall prescribe such regulations as he considers
3 necessary or appropriate to carry out the provisions of sub-
4 sections (f) and (g) of this section, including regulations
5 which prescribe administrative reprimand, suspension, or
6 other disciplinary action for the improper classification of
7 official information or material.

8 “(2) The Comptroller General of the United States
9 shall monitor the actions taken by agencies to implement and
10 adhere to the policies and provisions of subsections (f) and
11 (g) of this section. To this end the Comptroller General
12 shall perform, among others, the following functions:

13 “(A) obtain and review agency implementing
14 regulations and those of such subordinate components
15 as may be necessary to determine the effectiveness of
16 agency actions;

17 “(B) inquire on a periodic basis regarding the need
18 for assignment or retention of the defense data designa-
19 tion on selected documents and other material;

20 “(C) conduct visits on a periodic basis to observe
21 the practical application of classification and declassi-
22 fication policy and the safeguarding of defense data by
23 officers and employees of agencies;

24 “(D) investigate, when deemed appropriate, in-
25 quires initiated by private citizens, officers, or em-

1 ployees of the United States, or any other person con-
2 cerning any allegation of improper classification of in-
3 formation or material, or concerning any allegation of
4 the failure of any agency, or any officer or employee
5 thereof, to comply with the policies and provisions of
6 subsection (f) or (g) of this section, or any regulation
7 prescribed under this subsection; and

8 “(E) transmit semiannual reports not later than
9 March 1 and September 1 of each year to the Committee
10 on Government Operations of the Senate and to the Com-
11 mittee on Government Operations of the House of Rep-
12 resentatives, setting forth the findings of such reviews,
13 inquiries, visits, and investigations as may have been
14 conducted pursuant to subparagraphs (A) through (D)
15 during the reporting period, as well as any other mat-
16 ters pertaining to the implementation of subsections (f)
17 and (g) which may be of interest to such committees.
18 Such reports also shall contain any recommendations
19 for action by such committees relating to this Act which
20 the Comptroller General may deem appropriate.

21 “(i) No person may withhold or authorize withholding
22 information or material from the Congress, or from any com-
23 mittee or Member thereof, or from any court of the United
24 States on the basis that such information or material is
25 classified or qualified for classification as ‘Defense Data’ or

1 is otherwise classified pursuant to any law, Executive order,
2 directive, memorandum, or other authority.”.

3 ATOMIC ENERGY RESTRICTED DATA

4 SEC. 3. The provisions of this Act shall not affect any
5 requirement made by or under the Atomic Energy Act of
6 1954, as amended, regarding the designation and protection
7 of Restricted Data, as defined in that Act.

8 EFFECTIVE DATE

9 SEC. 4. (a) Except as provided in subsection (b) the
10 provisions of this Act shall take effect on the first day of the
11 third month that commences after the date of its enactment.

12 (b) Section 552 (h), as added by section 2 of this title,
13 shall take effect upon the date of the enactment of this Act.

14 DEFINITION

15 SEC. 5. As used in this Act the term “information”
16 means knowledge which can be communicated by any means,
17 as set forth in D.O.D. 5200.1-R, Information Security Pro-
18 gram Regulation.

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